

8-15-2014

# Pines v. Idaho State Bd. of Medicine Appellant's Brief Dckt. 41972

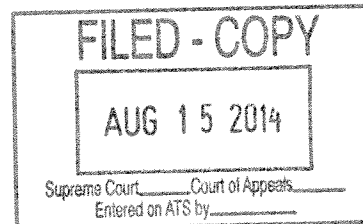
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**II. Statement of the Case:**

This case involves the question of whether a doctor may be disciplined for a massage between consenting adults. Dr. Pines either approached or was approached by adult men in four instances. Each time, Dr. Pines asked that the witness allow him to perform a massage as a part of either massage therapy training or osteopathic training. No such training was required by the certification process. Though neither the complaining witnesses nor the doctor thought they were patients, or received any diagnosis or treatment for any actual malady, the Board of

Medicine has concluded that all were in fact patients, and revoked Dr. Pines' license to practice medicine. The Board's practical position in this case is that a physician may be disciplined for actions that are neither criminal nor with a patient.

While Dr. Pines' behavior may have been objectionable, it was neither a violation of Idaho Code nor the relevant regulations. The men were not his patients, any trust that existed between them did not arise from being a patient, and, as the Board's expert testified, the sum total of sexual contact with all four men was mutual masturbation with a single witness (the same witness who testified under oath that he was "playing" Dr. Pines for money). *See Tr., Vol. III, p. 411.*

The Board of Medicine's Complaint alleges five counts. *See Agency R., Complaint, p. 1-7.* Count IV was dismissed by the District Court, and the Board has not appealed this decision. *See Memorandum Decision; Notice of Cross Appeal, R, p. 266; 306.* Though the Final Order is not clear, it appears that the Board ruled that all other allegations were proven. The District Court sustained the Board on those counts.

The Complaint's single allegation related to activities with a minor is Count V (B.H.). Evidence at hearing definitively established that B.H. was an adult when any contact occurred. *See Tr., Vol. I, p. 172.* No other Count alleges any action involving minors. *See Agency R., Complaint, ¶¶ 2, 6, 10.* No evidence was presented to prove that any of the alleged misconduct occurred when the witnesses were minors.

Notwithstanding the plain language of the Complaint, or the evidence presented at hearing, the Board focused extensively in the Final Order on actions it alleges took place when

the witnesses were minors. The District Court did not address this repeated reliance on uncharged conduct.

The Final Order fails constitutional review as it relies upon uncharged conduct and violates fundamental principles of due process. It fails statutory review given it drew conclusions that are not supported by any evidence. The Final Order also fails procedurally as it does not provide a factual basis for its conclusions, functionally lacks findings of fact, and rejects the Hearing Officer's proposed order without an adequate explanation supporting the departure.

Coupled with the violations of due process, statutory, and procedural shortcomings, the Final Order's conclusions lack any substantial evidentiary support. The Board has drawn conclusions that contradict their own complaining witnesses, their own expert, law enforcement, and the record. It has therefore failed to prove by clear and convincing evidence that the charged conduct violated the statutes or regulations, and rather, opted to rely on their own unstated "understandings" to find a violation of law and statute. The Final Order must be set aside, and this matter dismissed.

### **III. Legal Authority:**

#### **a. Burden of Proof:**

The burden of proof in a physician disciplinary proceeding is the "clear and convincing" standard. Idaho Code § 54-1814(7). *Laurino v. Bd. of Prof. Disc. of Idaho State Bd. of Med.*, 137 Idaho 596, 601, 51 P.3d 410, 415 (2002).



**b. Standard of Review:**

The Idaho Administrative Procedure Act, Idaho Code § 67-5279, sets forth the standard of review for an appeal from a disciplinary proceeding by the Board of Medicine. *Laurino v. Bd. of Prof. Disc. of Idaho State Bd. of Med.*, 137 Idaho 596, 601, 51 P.3d 410, 415 (2002); *see also* Idaho Code § 54-1806A(11). “Judicial review of disputed issues of fact must be confined to the agency record for judicial review...” Idaho Code § 67-5277.

(3) When the agency was required by the provisions of this chapter or by other provisions of law to issue an order, the court shall affirm the agency action unless the court finds that the agency's findings, inferences, conclusions, or decisions are:

- (a) in violation of constitutional or statutory provisions;
- (b) in excess of the statutory authority of the agency;
- (c) made upon unlawful procedure;
- (d) not supported by substantial evidence on the record as a whole; or
- (e) arbitrary, capricious, or an abuse of discretion.

If the agency action is not affirmed, it shall be set aside, in whole or in part, and remanded for further proceedings as necessary.

(4) Notwithstanding the provisions of subsections (2) and (3) of this section, agency action shall be affirmed unless substantial rights of the appellant have been prejudiced.

Idaho Code § 67-5279. Idaho Code § 67-5248 requires an order.

The Court will defer to the agency's findings of fact unless those findings are clearly erroneous. *Laurino*, 137 Idaho at 601, 51 P.3d at 415. The agency's findings must be affirmed unless the findings are not supported by substantial evidence on the record as a whole, Idaho

Code § 67-5279(3), or the findings are arbitrary, capricious, or an abuse of discretion, Idaho Code § 67-5279(2)(d). *Id.* Any findings made by the Board based on matters outside the record must be reversed as unsupported by substantial, competent evidence or as arbitrary and capricious. *Id.*

When reviewing a District Court's decision in a petition for judicial review under the Idaho Administrative Procedure Act, the Supreme Court examines the agency record independently, but ultimately decides whether the District Court correctly ruled on the issues presented to it. *Peckham v. Idaho State Bd. of Dentistry*, 154 Idaho 846, 851, 303 P.3d 205, 210 (2013). It is the Board's burden to prove its case by clear and convincing evidence, rather than the accused's burden to prove his innocence. *Id.* p. 852, 303 P.3d at 211. And, while the Board may use its expertise to reach factual findings based on evidence in the record, that expertise cannot serve as a substitute for necessary evidence. *Id.* citing *Paul v. Bd. of Prof'l Discipline of Idaho State Bd. of Med.*, 134 Idaho 838, 842, 11 P.3d 34, 38 (2000).

#### **IV. Attorney Fees on Appeal:**

The Appellant is not seeking to recover attorney fees on appeal.

#### **V. Issues Presented on Appeal and Arguments:**

- a. **Dr. Pines' right to due process has been violated by being disciplined for uncharged conduct.**

Because the Final Order repeatedly bases its conclusions on allegations that were not contained in the Complaint, Dr. Pines' due process rights were violated.

Dr. Pines is entitled to due process safeguards in a disciplinary proceeding which include the right to be fairly notified of the issues to be considered. *Pearl v. Bd. of Prof. Disc. of the Idaho State Bd. of Med.*, 137 Idaho 107, 114, 44 P.3d 1162, 1170 (2002). Where a decision is based on allegations of which the physician has not received notice, the decision should be overturned as a denial of due process. *Id. citing Krueger v. Bd. of Prof. Disc.*, 122 Idaho 577, 836 P.2d 523 (1992). In *Krueger*, this Court upheld the District Court's dismissal of the claim that alleged a delay in administering a c-section, but relied in the final order upon the provision of a drug during the delivery for a violation of the standard of care. *Krueger*, 122 Idaho at 582, 836 P.2d at 528 ("deviation between the allegations and the proof as to patient H which violated Dr. Krueger's constitutional right to procedural due process."). In *Pearl*, this Court looked to several specific allegations in the complaint, and took issue with findings that were not based upon such. The Court specifically held that the Board basing its decision on violations that were not specifically pled "violated Dr. Pearls' due process rights by considering this evidence." 137 Idaho at 115, 44 P.3d at 1170.

The Complaint contains a single allegation related to Dr. Pines and a single minor. *See Agency R., Complaint*, p. 6 (B.H.). This allegation was proven inaccurate by the Board's own witness. *See Tr., Vol. I*, pp. 172, 182 (testimony of B.H.).

Notwithstanding the lack of any allegations related in the juveniles, the Final Order relies heavily upon uncharged conduct related to minors. *See Agency R., Complaint; Final Order*.<sup>1</sup>

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<sup>1</sup> "As a physician, benefactor and foster/respite parent, he stood in a position of power, authority and supervision over these boys." [Final Order, p. 1] *continued*

Beyond B.H., which was proven false, the Complaint did not allege a single action related to the witnesses while minors. As such, the entire Final Order, and its repeated and heavy reliance on uncharged conduct, violates Dr. Pines' right to due process under *Pearl* and *Krueger*.

The Final Order should be dismissed in its entirety for relying upon uncharged conduct.

**b. Even if the Complaint alleged activities related to minors, there is no substantial evidence to support the Board's findings on such.**

Among other statements involving minors (see footnote 1 above), the Board ruled that "The evidence clearly establishes that Dr. Pines engaged in sexual exploitation with the four (4) boys, prior to them reaching the age of eighteen (18), while acting as a foster/respice parent, father figure, and benefactor." *See* Agency R., Final Order, p. 2. The Board further states that "Dr. Pines admitted to engaging in sexual activity such as naked massages, disrobing and asking the boys to disrobe in his present while they were in his care. (Letter from H&W, dated July 11, 2011)." *See* Agency R., Final Order, p. 1.

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Footnote 1 continued: "Dr. Pines admitted engaging in sexual activity such as naked massages, disrobing and asking the boys to disrobe in his presence while they were in his care." [*Id.*]

"The evidence clearly establishes that Dr. Pines engaged in sexual exploitation with the four (4) boys, prior to them reaching the age of eighteen (18), while acting as a foster/respice parent, father figure, and benefactor." [p. 2]

"The evidence clearly establishes that Dr. Pines held himself out as a physician while engaging in sexual exploitation of these four (4) minors under the ruse they were practice patients." [p. 3]

"Extensive testimony was presented documenting Dr. Pines "groomed" these boys by providing them with gifts, outings and giving each of these boys, after using the hot tub, naked massages on the floors of his bedroom at his Boise home and Garden Valley cabin." [p. 4]

"Dr. Pines held himself out as a physician while engaging in sexual exploitation of these four (4) minors under the ruse they were 'practice patients.'" [p. 3]

*See* Agency R., Final Order.

The burden of proof in a physician disciplinary proceeding is the “clear and convincing” standard. Idaho Code § 54-1814(7). *Laurino v. Bd. of Prof. Disc. of Idaho State Bd. of Med.*, 137 Idaho 596, 601, 51 P.3d 410, 415 (2002).

The Idaho Administrative Appeals Act, as well as caselaw, requires findings of fact to support any final order:

Idaho Code § 67-5248. CONTENTS OF ORDERS

(1) An order must be in writing and shall include:

(a) A reasoned statement in support of the decision. Findings of fact, if set forth in statutory language, shall be accompanied by a concise and explicit statement of the underlying facts of record supporting the findings.

(b) A statement of the available procedures and applicable time limits for seeking reconsideration or other administrative relief.

(2) Findings of fact must be based exclusively on the evidence in the record of the contested case and on matters officially noticed in that proceeding.

Idaho Code § 67-5248. *Peckham v. Idaho State Bd. of Dentistry*, 154 Idaho 846, 852, 303 P.3d 205, 211 (2013). According to the Court of Appeals:

...it is consistent with the Board's statutory obligation to render a reasoned decision to require the Board to identify facts, as well as inferences drawn from the facts upon the application of its expertise and judgment, which underlie its decision. Such an explanation is essential to meaningful judicial review, and it is a logical adjunct to the agency's statutory duty to supplement its decisions with findings of fact and conclusions of law.

*Woodfield v. Bd. of Prof. Disc. of Idaho State Bd. of Med.*, 127 Idaho 738, 747, 905 P.2d 1047, 1056 (Ct.App. 1995). “Any findings made by the Board based on matters outside the record must be reversed as unsupported by substantial, competent evidence or as arbitrary and capricious.” *Laurino v. Bd. of Prof. Disc. of Idaho State Bd. of Med.*, 137 Idaho 596, 601, 51 P.3d 410, 415 (2002).

The Hearing Officer concluded that:

There is no dispute that the incidents in question occurred after the individuals had reached the age of 18 years...

None of Dr. Pines interactions with any of the named individuals while they were under the age of 18 could be said to rise to the level of any inappropriate or unethical sexual conduct or contact. At most, the testimony indicates that Dr. Pines treated each of the four named individuals in the same method and manner as he treated his own children with regarding to house rules for using the hot tub. No testimony of any witness supports a finding that Dr. Pines acted in violation of Medical Practice Act or the duly adopted Board rules governing the practice of medicine in the state of Idaho while any of the named individuals was under the age of 18.

*See Agency R., Recommended Findings*, pp. 4, 5-6.

As indicated by the Hearing Officer, there is no evidence to support the Board’s conclusions. As such, the Board has failed its statutory burden of providing “a concise and explicit statement of the underlying facts of record supporting the findings” and failed its burden of proving the claims by clear and convincing evidence. Idaho Code § 67-5248. The Board has also failed to base its findings of fact on evidence in the record. As one example of several, the letter from Health and Welfare relied upon by the Board contains no admission of sexual contact

with minors whatsoever.<sup>2</sup> As to the testimony at hearing, no witness testified to any sexual contact while a minor. To the contrary, each complaining witness denied any sexual contact as a child. *See* Tr., Vol. I, p. 30, l. 9; p. 21-23, p. 52, ll. 12-21(N.R.); p. 75, ll. 20, p. 76, l. 23, p. 81, l. 22 (S.G.); p. 117, ll. 1-3, 14-16, 20-23. (D.P.); p. 167, l. 7, p. 168, l. 13, 18-19; p. 169, l. 12-13 (B.H.).

There is no evidence in the record that Dr. Pines engaged in sexual conduct of any kind with any witness, or any other person, prior to them reaching the age of eighteen. While the Board may use its expertise to reach factual findings based on evidence in the record, that expertise cannot serve as a substitute for necessary evidence. *Peckham v. Idaho State Bd. of Dentistry*, 154 Idaho 846, 852, 303 P.3d 205, 211 (2013).

Because of the Board's repeat reliance on uncharged conduct, Dr. Pines' right to due process has been denied. Because there is no evidence to support those conclusions, the Board's ruling also violates Idaho Code § 67-5279(3)(d), *Laurino*, and *Peckham* as it is not based upon substantial evidence, and is certainly short of the clear and convincing burden of proof.

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<sup>2</sup> The letter referenced by the Board is their Exhibit 18, p. 1. There is no reference whatsoever to Dr. Pines admitting any of the latter allegations. The letter from Health and Welfare states that he admitted consensual sexual contact with adults, nothing more. *Id.* Dr. Pines responded in writing to the July 11 letter from Health and Welfare. *See* Board's Ex. 19. It states that "I am in total disagreement with the following comment: "you were involved with activity such as disrobing and asking youth to disrobe in your presence while they were in foster care." *Id.* Testimony presented by the Board confirmed this fact. David Sanders of Health and Welfare testified that "Dr. Pines also acknowledged that he had had sexual relationships ... after they turned age 18." *See* Tr., Vol. II, p. 342. On cross examination Mr. Sanders admitted that the witnesses had turned 18 and were no longer within the foster care program when the contact occurred. *See* Recommended findings, p. 5.

- c. **The Final Order violates Dr. Pines' constitutional right to due process as applied by concluding that the statutes and regulations were violated through contact with a "patient."**

The Final Order largely relies on the conclusion that all four of the complaining witnesses were "patients." *See* Agency R., Final Order, pp. 2-3. The District Court's Memorandum Decision likewise ruled that all four of the witnesses were such, and deferred to the Board to determine whether a person is a patient. *See* Memorandum Decision, R, pp. 277-285.<sup>3</sup> This conclusion belies Idaho Code, the testimony of both the doctor and the supposed "patients," and does exactly what is barred by Idaho caselaw.

Rather than apply the language of Idaho law, the Board instead relies solely upon their own opinions without reference to statutory authority. They admit as much when they claim the Hearing Officer's conclusions are inaccurate because he did not understand "changes in attitude and behavioral accountability the Board demands of the physicians it licenses." *See* Agency R., Final Order, p. 2. To the contrary, the Hearing Officer applied the plain meaning of the statutes and regulations, which is required by fundamental due process. Dr. Pines cannot be disciplined for violating "changes in attitude" or "behavioral accountability the Board demands" without a basis in law.

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<sup>3</sup> In doing so, the District Court adopted the Board's arguments that they did not actually reject the Hearing Officer's Findings of Facts and Conclusions of Law, but accepted some to support the conclusion. *See* Memorandum Decision, R., p. 279. The District Court did not explain how the Final Order's whole cloth rejection of the Hearing Officer's Findings of Fact was somehow not what it states: "After consideration and discussion, the Board rejected the Hearing Officer's Recommended Findings of Fact and Conclusions of Law (hereinafter Recommended Findings) issued on February 13, 2013, after concluding the Hearing Officer immeasurably failed to comprehend the principal issues in this case. The Board opined the Hearing Officer's failure emanated from a lack of understanding and experience in using multiple forms of legal-medical data to inform his Recommended Findings and his preservice as a Hearing Officer did not prepare him or serve as a guide through the changes in attitude and behavioral accountability the Board demands of the physicians it licenses." *See* Final Order, p. 2.



A statute may be void for vagueness if it fails to give adequate notice to people of ordinary intelligence concerning the conduct. *Kolender v. Lawson*, 461 U.S. 352, 357–58, 103 S.Ct. 1855, 1858, 75 L.Ed.2d 903, 908–09 (1983); *State v. Korsen*, 138 Idaho 706, 711, 69 P.3d 126, 131 (2003). Stated another way, “[A] statute is unconstitutionally vague when its language does not convey sufficiently definite warnings as to the proscribed conduct, and its language is such that men [or women] of common intelligence must necessarily guess at its meaning.” *Wyckoff v. Bd. of County Commissioners of Ada County*, 101 Idaho 12, 15, 607 P.2d 1066, 1069 (1980); *See also Keyishian v. Bd. of Regents*, 385 U.S. 589, 87 S.Ct. 675, 17 L.Ed.2d 629 (1967).

A statute may be challenged as unconstitutionally vague on its face or as applied to a defendant's conduct. *Korsen*, 138 Idaho at 712, 69 P.3d at 132. To succeed on an “as applied” vagueness challenge, a complainant must show that the statute, as applied to the defendant's conduct, failed to provide fair notice that the defendant's conduct was proscribed or failed to provide sufficient guidelines such that the police had unbridled discretion in determining whether to arrest him. *Id.* The doctrine is equally applicable to statutes prescribing a standard of conduct which, though not subject to criminal sanctions for violations thereof, is subject to regulation by an administrative board or agency. *Tuma v. Bd. of Nursing*, 100 Idaho 74, 79, 593 P.2d 711, 716 (1979).

In *Tuma*, this Court ruled that the application of regulations controlling the practice of nursing did not place the nurse on notice that her behavior violated the regulation. The Court ruled that “We find nothing in the statutory definition of ‘unprofessional conduct’ which can be said to have adequately warned Tuma of the possibility that her license would be suspended if

she engaged in conversations with a patient regarding alternative procedures. Hence, it must be held that the statute, unaided by board rules and regulations, does not prohibit the conduct with which she was charged.” *Id.* at 80, 593 P. 2d at 717. The rationale was explained by a later

Supreme Court case:

The greatest shortcoming by both the Board of Nursing in *Tuma* and the Board of Engineers in this case is that instead of articulating clear standards of discipline, the Boards appear to prefer that their standards need not be declared, but rather that their “expertise and experience” and “collective knowledge” be applied on an ad hoc basis. This not only fails to warn the professional as to which acts are unlawful, but it renders judicial review superfluous. Without clearly articulated standards as a backdrop against which the court can review discipline, the judicial function is reduced to serving as a rubberstamp for the Board's action. Such a procedure would be an intolerable state of affairs, and not in compliance with requirements of due process.

*H & V Engineering, Inc. v. Idaho State Bd. of Professional Engineers and Land Surveyors*

113 Idaho 646, 650, 747 P.2d 55, 59 (1987)(internal quotations and citations omitted). This

Court later applied the standards from *Tuma* and *H&V* to a Board of Medicine proceeding:

In *Tuma* and *H & V*, we held that the administrative boards could not rely merely on their own expertise, experience and collective knowledge, but must articulate clear standards which will warn the professional as to which acts are unlawful.

*Krueger v. Bd. of Prof. Disc. of Idaho State Bd. of Med.*, 122 Idaho 577, 581, 836 P.2d 523, 527

(1992). The Court in *Krueger* distinguished that claim based upon that fact that in *Tuma* and

*H&V*, “the respective boards did not rely on the testimony of expert witnesses with regard to the professional standards in question, and instead relied solely on the expertise of the members of the board.” *Id.*

Just as in *Tuma* and *H&V*, here, the Board has relied solely upon its own expertise while disregarding the plain statutory language, the actual evidence, and its own witnesses.

N.R. agreed that he was “never a patient.” *See* Tr., Vol. I, p. 47, l. 21. S.G. testified that Dr. Pines “was never my doctor.” *Id.* p. 110, ll. 24-25. D.P. testified that Dr. Pines was his doctor at the Northwest Children’s Home, but not thereafter, and he did not know he was a psychiatrist. *Id.* p. 110-111. B.H. testified unequivocally that he never had a doctor patient relationship with Dr. Pines, and stated that any relationship that did exist arose socially. *Id.* p. 182 (“Q: You never had a doctor patient relationship with Dr. Pines, did you? A: I did not”). In addition to the complaining witnesses, the Board’s only expert who addressed the question (Dr. McPherson) testified that “using their skills as a physician or a nurse practitioner to make or rule out diagnoses” creates a doctor patient relationship. *See* Tr., Vol. III, p. 430.

Notwithstanding this evidence, the Board concluded that Dr. Pines violated all of the charged statutes and regulations based upon the finding that any “affirmative act” creates a doctor patient relationship. *See* Agency R., Final Order, p. 5.

The Medical Practices Act does not define “patient” but it does define the practice of medicine. *See* Idaho Code § 54-1803. Practicing medicine is to “investigate, diagnose, treat, correct or prescribe for any human disease, ailment, injury, infirmity, deformity or other condition, physical or mental, by any means or instrumentality.” Idaho Code § 54-1803(1). Idaho Code’s definition of practicing medicine is notably directly on point with the expert testimony offered by the Board.

Idaho Code § 18-919 applies to actions “with a patient or client.” Idaho Code § 18-919(a). A medical care provider “means a person who gains the trust and confidence of a patient or client for the examination and/or treatment of a medical or psychological condition, and thereby gains the ability to treat, examine and physically touch the patient or client.” Idaho Code § 18-919(b).

Idaho Code § 54-1814(7) applies to the “provision of health care.” Section (21) only applies to “any act constituting a felony or commission of any act constituting a crime involving moral turpitude.” Idaho Code § 54-1814(21). The following section prohibits “any conduct which constitutes an abuse or exploitation of a patient arising out of the trust and confidence placed in the physician by the patient.” Idaho Code § 54-1814(22).

IDAPA 22.01.01.101.04 applies to “any conduct which constitutes an abuse or exploitation of a patient arising out of the trust and confidence placed in the physician by the patient.” IDAPA 22.01.01.101.04. The regulation states that its application is limited to patients or former patients no less than six times. *Id.*

Notwithstanding their own evidence presented at hearing, the Board argues that under the “ordinary meaning, a patient is an individual who receives any professional services from the physician.” *See* Final Order, p. 5. It also argues that in the alternative, it should be “some affirmative act on the part of the physician” based upon a website. *Id.* The District Court held that “As physicians, the Board is entitled to use its expertise to determine that a patient can be more than just a person who pays the physician money and comes to an office for services.” *See* Memorandum Decision, R, p. 280.

Here, Dr. Pines did not seek to make or rule out a diagnosis. He did not “investigate, diagnose, treat, correct or prescribe for any human disease, ailment, injury, infirmity, deformity or other condition, physical or mental, by any means or instrumentality.” Idaho Code 54-1803(1). He did not provide “professional services” to any of the witnesses at the relevant times. No witness thought that they were being treated for any malady whatsoever, nor that Dr. Pines was their physician. Notwithstanding these facts, the Board and the District Court conclude that each of the four complaining witnesses was a patient.

This finding by the Board violates Dr. Pines’ right to due process as applied as the behavior for which he is being disciplined is not clear. Under *Krueger*, the Board has failed to warn its members that any “affirmative act” will create a doctor patient relationship. *Krueger v. Bd. of Prof. Disc. of Idaho State Bd. of Med.*, 122 Idaho 577, 581, 836 P.2d 523, 527 (1992). Further, there is plainly no basis in the law or regulations to apprise the public of what “changes in attitude and behavioral accountability the Board demands of the physicians it licenses” may be. See Agency R., Final Order, p. 2. A physician is bound by laws and regulations, not “changes in attitude.”

Under *Tuma* and *H & V*, the exact unconstitutional conduct prohibited by the Supreme Court is present here: “instead of articulating clear standards of discipline, the Boards appear to prefer that their standards need not be declared, but rather that their ‘expertise and experience’ and ‘collective knowledge’ be applied on an ad hoc basis.” *H & V Engineering, Inc. v. Idaho State Bd. of Professional Engineers and Land Surveyors*, 113 Idaho 646, 650, 747 P.2d 55, 59 (1987).

Neither the statutes nor the regulation apply to non-patients or relationships that were not founded in the doctor patient context. Because the statutory and regulatory language do not place a physician on notice that he can be disciplined when neither party thinks there is a doctor patient relationship, or when he is not diagnosing or treating maladies, the statutes and regulation failed to provide fair notice that the defendant's conduct was proscribed. *Korsen*, 138 Idaho at 712, 69 P.3d at 132.

As applied, the Board has violated Dr. Pines constitutional right to due process in its application of Idaho Code §§18-919, 54-1814 and IDAPA 22.01.01.101.04. It therefore is in excess of statutory authority, violates the statutory provisions, and is hence arbitrary, capricious, and an abuse of discretion.

**d. Because there was no evidence that the source of any trust that existed arose from a doctor patient relationship, the Board's application of the statutes and regulation is not supported by substantial evidence and is arbitrary and capricious.**

Because the Board did not provide any evidence that the source of any trust that did exist arose through a doctor patient relationship, the Board failed to carry its burden of proof, and applied the statutes and regulations in an arbitrary and capricious manner. While the Board states that it “was acutely aware that Dr. Pines acted and held himself out as a physician to these foster sons and other boys for the length of their stays with him,” this statement is not supported by anything other than general knowledge that Dr. Pines was a doctor. *See Agency R., Final Order*, p. 2.

Any findings made by the Board based on matters outside the record must be reversed as unsupported by substantial, competent evidence or as arbitrary and capricious. *Laurino v. Bd. of Prof. Disc. of Idaho State Bd. of Med.*, 137 Idaho 596, 601, 51 P.3d 410, 415 (2002).

Idaho Code § 18-919 addresses “sexual exploitation by a medical care provider.” Idaho Code 18-919(b)(2). A “medical care provider” is someone “who gains the trust and confidence of a patient or client for the examination and/or treatment of a medical or psychological condition, and **thereby gains the ability to treat, examine and physically touch the patient or client.**” Idaho Code 18-919(b)(2)(emphasis added).

Idaho Code § 54-1814 bars “Engaging in any conduct which constitutes an abuse or exploitation of a patient **arising out of the trust and confidence placed in the physician by the patient.**” Idaho Code § 54-1814(22)(emphasis added). The regulation mirrors Idaho Code § 54-1814. *See* IDAPA 22.01.01.101.4.d.

Without proving that the underlying relationship arose in the doctor patient context, the Board cannot prove a violation of Idaho Code § 54-1814 or the regulation. *See Levin v. Idaho State Bd. of Med.*, 133 Idaho 413, 987 P.2d 1028 (1999). In *Levin*, the court ruled that consensual sexual relationship between adults was not a violation of Idaho Code § 54-1814(22) because the relationship of trust that existed between the patient and the doctor arose in a social setting. The Court properly ruled that “regulation 101.04.d was not breached based upon the hearing officer’s determination that there was no showing that there was an exploitation of KE arising out of the trust and confidence placed by KE in Dr. Levin as a physician.” 133 Idaho at 418, 987 P.2d at 1033.

Each of the witnesses was asked if they knew Dr. Pines was a doctor, but none testified that the foundation of any trust that may have existed was due to Dr. Pines being a physician. None testified that their relationship was founded in a doctor patient context.

N.R. was asked if he knew Dr. Pines was a doctor, but denied that there was ever a doctor patient relationship: “Q: Did you know Dr. Pines was a doctor? A: Yes, ma’am.” *See* Tr., Vol. I, p. 26, ll. 19-20. “Q: And do you remember telling him that you never had been a patient of Dr. Pines? A: Yes. Q: And that’s true; you were never a patient? A: Yeah.” *Id.* p. 47, ll. 16-21.

S.G. also testified that he was never Dr. Pines’ patient: “Q: Did you know Dr. Pines was a physician? A: I did, yes.” *Id.* p. 73, ll. 9-10. “Q: And he was never your doctor, was he? A: He never – was never my doctor.” *Id.* p. 92, ll. 15-16.

D.P. testified that he “knew Dr. Pines was a doctor.” *Id.* p. 110, ll. 24-25. No testimony was offered about Dr. Pines holding himself out as a physician while D.P. was a foster child. While D.P. did state that Dr. Pines was his treating physician at Northwest Children’s Home, he also stated that he had no idea what Dr. Pines’ job was at the Northwest Children’s Home: “Q: And you knew he was a psychiatrist? A: Well, I didn’t – you know I didn’t know specifically what his job was. I just know what I was going there for.” *See* Tr., Vol. I, p. 110-111. D.P. also stated that he did not know his eventual diagnosis once he attended the Children’s Home. *Id.* p. 145.

B.H. provided zero testimony that Dr. Pines held himself out as a physician in his presence. *See* Tr., Vol. I, pp. 163-180. B.H. was never a foster child. *Id.* B.H. also testified that



he never had a doctor patient relationship with Dr. Pines, and stated that any relationship that did exist arose socially. *Id.* p. 182 (“Q: You never had a doctor patient relationship with Dr. Pines, did you? A: I did not”).

There is simply no factual basis to conclude the source of any trust that existed arose from a doctor patient relationship. The Board has basically taken the position that because Dr. Pines was a physician, the statutes and regulations apply. This is not consistent with the plain language of the law, nor this Court’s interpretation of such in *Levin*. By finding otherwise, under *Laurino*, the Board has failed to support its finding with substantial evidence, and applied the statutes and regulations in an arbitrary and capricious manner. Under Idaho Code § 67-5279, the Board’s Final Order is in excess of statutory authority, violates the statutory provisions, and must be dismissed.

**e. The Board failed to carry its burden of proving the allegations in the complaint by clear and convincing evidence.**

Because the Final Order fails to reconcile the Board’s conclusions with the actual evidence in the record, and their conclusion contradicts that evidence, this matter must be dismissed because the Board has failed to fulfill the burden of proving its case by clear and convincing evidence.

The burden of proof in a physician disciplinary proceeding is the “clear and convincing” standard. Idaho Code § 54-1814(7). *Laurino v. Bd. of Prof. Disc. of Idaho State Bd. of Med.*, 137 Idaho 596, 601, 51 P.3d 410, 415 (2002); *Cooper v. Bd. of Prof. Disc. of Idaho State Bd. of*

*Med.*, 134 Idaho 449, 4 P.3d 561(2000). In *Cooper*, the Court ruled that the failure to reconcile contradictory evidence failed the clear and convincing burden of proof:

J.H.'s testimony cannot be reconciled with exhibits and testimony from other witnesses. The Board did not find that the witnesses as to Cooper's activities on November 24 were not credible. Neither did it explain the discrepancies between J.H.'s testimony and the exhibits. Accordingly, the Board did not meet its burden of showing that Cooper violated Idaho Code § 54-1814(22) by having a sexual encounter with J.H.

*Id.* at 456, 4 P.3d at 568. In *Cooper*, this Court overturned and dismissed the Board's ruling because it failed to address the contradictory evidence in the record.

Here, the Board has chosen to conclude that all of the relevant statutes and regulations were violated because the witnesses were "patients." Though, no witness testified that they were a patient of Dr. Pines when the events occurred. N.R. agreed that he was "never a patient." *See* Tr., Vol. I, p. 47, l. 21. S.G. testified that Dr. Pines "was never my doctor." *Id.* p. 110, ll. 24-25. D.P. testified that Dr. Pines was his doctor at the Northwest Children's Home, but not thereafter, and he did not know he was a psychiatrist. *Id.* p. 110-111. B.H. testified unequivocally that he never had a doctor patient relationship with Dr. Pines, and stated that any relationship that did exist arose socially. *Id.* p. 182. Dr. McPherson testified that "using their skills as a physician or a nurse practitioner to make or rule out diagnoses" creates a patient/doctor relationship. *See* Tr., Vol. III, p. 430.

In *Cooper*, the Board failed to reconcile contradictory evidence. Here, the Board simply chose to ignore the evidence in the record, and based its conclusions on its own expertise in direct contradiction to their own witnesses. There is no evidence that the witnesses were

patients. As such, the Board has failed to reconcile the actual evidence, and hence failed to fulfill its burden of proving by clear and convincing evidence any of the allegations in the complaint. Under *Cooper*, it should be dismissed.

Though the Final Order should be dismissed outright based upon the preceding arguments, it also fails scrutiny when each count is considered individually.

**f. Count I: N.R.**

- i. There is no evidence that Dr. Pines committed a felony, or an act constituting a crime of moral turpitude, and the Board's conclusion otherwise lacks any specific factual basis.**

Count I first alleges that Dr. Pines has violated the Medical Practices Act because he “committed an act constituting a felony or committed an act constituting a crime of moral turpitude in violation of Idaho Code §54-1814(21) and Idaho Code § 18-919.” *See Agency R., Complaint*, p. 2.

Idaho Code § 54-1814(21) provides for the discipline of a physician for the “(21) Commission of any act constituting a felony or commission of any act constituting a crime involving moral turpitude....” Idaho Code § 54-1814. Under the plain language of the statute, Idaho Code § 54-1814(21) requires either a “felony,” or a “crime of moral turpitude....” Idaho Code § 54-1814(21).

Idaho Code §18-919 states that it is a crime to “engage in an act of sexual contact with a patient or client.” Idaho Code § 18-919. A “medical care provider” under the statute is limited to a person who “gains the trust and confidence of a patient or client *for the examination and/or treatment of a medical or psychological condition...*” Idaho Code § 18-919(b)(2)(emphasis

added). This plainly states that the underlying trust and confidence must have arisen from the treatment of a medical or psychological condition, and that the alleged victim must be a “patient or client.”

The Final Order states that “As these boys receive affirmative acts on the part of Dr. Pines, they were ‘patients.’” *See* Agency R., Final Order, p. 3. The Final Order also states that “since physicians ‘practice medicine,’ practice patients certainly fall within the statutory definitions and coverage of the Medical Practices Act.” *Id.* It then states that “the evidence clearly establishes that Dr. Pines held himself out as a physician while engaging in sexual exploitation of these four (4) minors under the ruse they were ‘practice patients.’” *Id.*<sup>4</sup> Based upon these unsupported assertions, the Board then concluded that because the witnesses were patients, a crime occurred in violation of Idaho Code § 18-919. *Id.* p. 6. The District Court agreed with the Board’s rationale that a crime of moral turpitude occurred because the four witnesses were actually patients. *See* Memorandum Decision, R, pp. 277-285.

The actual evidence in the record is contrary to the Board’s unsupported conclusions.

N.R. testified unequivocally that Dr. Pines was never his physician.<sup>5</sup> *See* Tr., Vol. I, p. 47, ll. 16-21.

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<sup>4</sup> This final conclusion is particularly questionable given no witness testified that any of the charged events occurred while they were a minor. Further, the factual basis for Counts 1-4 are entirely based upon allegations related to actions taken when the witnesses were adults.

<sup>5</sup> Q: And do you remember telling him that you never had been a patient of Dr. Pines?  
A: Yes.  
Q: And that’s true; you were never a patient?  
A: Yeah.  
*See* Tr., Vol. I, p. 47, ll. 16-21.

The Board's expert witness, Dr. McPherson, testified that a doctor patient relationship is created by using one's skills as a physician to "make or rule out a diagnoses." *Id.*, Vol. III, p. 430.

The Ada County Prosecuting Attorney's office determined that no crime was committed by Dr. Pines in relation to N.R. The Board submitted this evidence at hearing. *See* Board's Ex. 4. The office declined prosecution because there was no doctor patient relationship and N.R. was an adult. *See* Tr., Vol. II, pp. 206, 297, 298. *See also* Board's Ex. 4. Contrary to the arguments in the Final Order, the prosecutors did not exercise their discretion opting not to file charges, the prosecutors concluded that no crime was committed. *See* Board's Ex. 4. ("ADA COUNTY PROSECUTORS DECISION: I briefed the Ada County Prosecutor's Office on this case. I was advised that since contact occurred after the children turned 18 there were no criminal charges that could be filed in that area. I was also advised that sexual abuse by a medical provider charges could not be filed since no doctor/patient relationship has been established.")

The Hearing Officer concluded that "At the time of the encounter between Dr. Pines and N.R. in January of 2011 there is no basis to find or conclude that N.R. was a patient of Dr. Pines." *See* Agency R., Recommended Findings, p. 7.

N.R, the Board's expert, the prosecuting attorney, and the Hearing Officer all determined that there was no underlying doctor patient relationship, and hence no crime. There is simply no evidence in the record to support a finding that N.R. was ever a patient of Dr. Pines. Because he was not, under Idaho Code §54-1814(21) and Idaho Code § 18-919, there is no evidence that

either a felony or a crime involving moral turpitude was committed, or that Dr. Pines engaged in an act of sexual contact with a patient or client.

The Final Order's conclusions as to N.R. in the first allegation of Count I are not supported by substantial evidence, and fail to identify any underlying evidence that provides them the authority to override their own evidence, the Hearing Officer, the witness, their own expert, or the Ada County Prosecuting Attorney. The conclusion also fails the clear and convincing standard, violates Idaho Code § 67-5248 because it does not provide a "concise and explicit statement of the underlying facts of record supporting the findings," and falls short of the standard set forth by the Supreme Court relative to rejecting a Hearing Officer's conclusions and the requirement of providing evidence to support their conclusion. *Woodfield v. Bd. of Prof. Disc. of Idaho State Bd. of Med.*, 127 Idaho 738, 905 P.2d 1047 (Ct.App. 1995).

Because N.R. was never a patient of Dr. Pines, there was no criminal behavior. Imposing discipline without a crime under Idaho Code § 18-919 and § 54-1814(21) is a violation of the statutory provisions, is in excess of the Board's statutory authority, and is arbitrary, capricious, and an abuse of discretion.

**ii. The Board has failed to prove the Dr. Pines violated Idaho Code §54-1814(22) because there is no evidence that N.R. was ever his patient.**

The second allegation in Count I pleads that Dr. Pines "has abused or exploited his position as a physician to engage in improper sexual contact in violation of Idaho Code § 54-1814(22) and IDAPA 22.01.01.101.04.d." *See* Agency R., Complaint, p. 2. This is not an accurate statement of the law.

Neither Idaho Code 54-1814(22) nor IDAPA 22.01.01.101.04.d bar “abusing or exploiting one’s position *as a physician*” to engage in a sexual relation. Rather, each bars the “abuse or exploitation *of a patient*.” See Idaho Code § 54-1814(22); IDAPA 22.01.01.101.04.d.<sup>6</sup> Facially, if the person with whom sexual conduct occurs is not a patient, neither the statute nor the regulation apply.

As explained above, the Final Order concludes that the witnesses were patients. See Agency R., Final Order, p. 5. No specific evidence is identified to support the conclusion that N.R. was Dr. Pines’ patient, nor does the Final Order identify what the “affirmative act” was relative to N.R..

Rather, N.R. testified that he was never a patient of Dr. Pines, the Board’s expert stated that the relationship would only arise if making or ruling out a diagnosis, the prosecutor concluded there was no doctor patient relationship, and the Hearing Officer concluded that no such relationship arose. See Tr., Vol. I, p. 47, Vol. II, pp. 206, 297, 298, Vol. III, p. 430; Board Exhibit 4; Recommended Findings, p. 7.

The Board has done exactly what is barred by *Tuma* and *H&V*: they have ignored the actual evidence and instead “relied solely on the expertise of the members of the board.” *Krueger*, 122 Idaho 577, 581, 836 P.2d 523, 527 (1992).

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<sup>6</sup> Idaho Code 54-1814(22): “(22) Engaging in any conduct which constitutes an abuse or exploitation of a patient arising out of the trust and confidence placed in the physician by the patient.” Idaho Code § 54-1814(22). The regulation bars “engaging in any conduct that constitutes an abuse of exploitation of a patient arising out of the trust and confidence placed in the physician by the patient.” IDAPA 22.01.01.101.4.

The statutory and regulatory provisions do not provide a basis for discipline in this situation. The Board's conclusion otherwise is in excess of the statutory authority of the agency, and is arbitrary, capricious, and an abuse of discretion. The conclusion also violates Idaho Code § 67-5248 because they do not provide a "concise and explicit statement of the underlying facts of record supporting the findings." Idaho Code § 67-5248.

- iii. **Even if the court could consider N.R. a patient at the time of the contact, Idaho law does not provide grounds for discipline because the trust and confidence that may have existed did not arise in the doctor patient context.**

The Board has failed to prove that any trust or confidence that may have existed between N.R. and Dr. Pines arose in the doctor patient context.

As explained above, Idaho law does not bar sexual relations between a patient and a doctor if the trust gained between the two was not garnered through the doctor patient relationship. *Levin v. Idaho State Bd. of Med.*, 133 Idaho 413, 418, 987 P.2d 1028, 1033 (1999).

N.R. testified that his relationship with Dr. Pines arose through a foster care placement. *See* Tr., Vol. I, p. 26. The Hearing Officer concluded that "There is no evidence in this case that the trust alluded to by N.R. in his testimony of Dr. Pines resulted from any physician patient relationship." *See* Agency R., Recommended Findings, p. 8.

Because any relationship that did exist was not based upon trust gained through the doctor patient relationship, the Board's conclusions are inconsistent with the statute, beyond their statutory authority, not supported by substantial evidence, and arbitrary, capricious and an abuse of discretion. The conclusion also violates Idaho Code § 67-5248 because they do not provide a



“concise and explicit statement of the underlying facts of record supporting the findings.” Idaho Code § 67-5248.

Specific to N.R., the Board has failed to prove that Dr. Pines committed a felony, a crime of moral turpitude, that a doctor patient relationship existed, or that any trust or confidence that did exist arose “for the examination and/or treatment of a medical or psychological condition.” As such, all claims in Count I fail, and the Board’s conclusion otherwise is inconsistent with the evidence or the law.

**g. Count II: D.P.**

**i. The Board cannot impose discipline for violating the standard of health care for actions that are not the provision of health care.**

The first allegation in Count II pleads that Dr. Pines “has provided health care which fails to meet the standard of health care provided by other qualified physicians in the same or similar communities,” in violation of Idaho Code § 54-1814(7) and IDAPA 22.01.01.101.04.d. *See* Agency R., Complaint, p. 3; Order Correcting Clerical Errors. This allegation is specific to D.P., and pleads only the sexual contact and a photo as a basis of the charge. *Id.* The Final Order appears to conclude that all charged conduct was proven, though there is no specific reference to this allegation.

The Idaho Supreme Court has expressly rejected this Board’s ability to find a violation of the “standard of care” regulation based upon “sexual contact, misconduct, exploitation or intercourse”:

...the Board held that Dr. Levin had violated Idaho Code § 54-1814(7) in that he engaged in behavior that is prohibited by the

Board of Medicine and therefore failed to meet the community standard of health care as required by the Board. The prohibited conduct in which Dr. Levin allegedly engaged is described in regulation 101.03.d, as the “[c]ommission of any act of sexual contact, misconduct, exploitation or intercourse with a patient or former patient or related to the licensee's practice of medicine.”<sup>7</sup>

We conclude that regulation 101.03.d, designating “sexual contact, misconduct, exploitation or intercourse” as a measure to gauge the provision of health care, is not within the expression of Idaho Code § 54-1814(7) and therefore is in excess of the authority of the Board to promulgate that regulation. ... Accordingly, that portion of the order by the Board suspending Dr. Levin's license for violating Idaho Code § 54-1814(7) and regulation 101.03.d is set aside.

*Levin v. Idaho State Bd. of Med.*, 133 Idaho 413, 418, 987 P.2d 1029, 1033 (1999).

Having sexual contact with a patient or former patient (much less a non-patient) is not the “provision of health care.” Idaho Code § 54-1814(7). One cannot use a statute which is limited on its face to “providing health care” to justify a violation based upon activities that were not the provision of health care.

Here, the alleged improper contact with D.P. had nothing to do with the provision of health care, nor gave rise to a doctor patient relationship. Rather, by D.P.’s own admission, he initiated the contact and it had nothing to do with any community standard of care. He stated that “I was playing him” for money. *See* Tr., Vol. I, p. 136. “Q: Why did you call him? A: ...I think it was like a spur of the moment, like I had a memory of him or something, and another selfish ambition popped in my mind that he had money and, well, I was going to try and go get money.” *Id.*, p. 122. The second time the two met as adults, he stated “I think it was again for

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<sup>7</sup> The former Section 101.03.d is identical to the current 101.04.d.

the money.” *Id.* at 126. In January of 2011, he again contacted Dr. Pines seeking money. *Id.* at 134.

The factual basis for D.P.’s initiation of contact with Dr. Pines is directly on point with the rationale offered by the Supreme Court in *Levin*. Consensual sexual contact between two adults cannot form the basis of a violation of Idaho Code § 54-1814(7) for failing the community standard of care because there was no “provision of health care.” Idaho Code § 54-1814. Further, given D.P. freely admitted that he was “playing” Dr. Pines for money, there is simply no basis to conclude that the relations had anything whatsoever to do with the provision of health care.

The Board lacks statutory authority to expand the application of Idaho Code 54-1814(7) into activities that are not the provision of health care. The same rationale applies to the regulation. The Board’s conclusion as to the first allegation in Count II fails as it is in violation of Idaho’s statutory provisions, was made in excess of the statutory authority of the agency, is not supported by substantial evidence, and is arbitrary, capricious, and an abuse of discretion. The conclusion also violates Idaho Code § 67-5248 because they do not provide a “concise and explicit statement of the underlying facts of record supporting the findings.” Idaho Code § 67-5248.

- ii. Because D.P. was not a present patient, and had not been for many years, the Board cannot discipline Dr. Pines for any alleged “abuse or exploitation” of D.P. under Idaho Code 54-1814(22) or the regulation.**

The second allegation in Count II, related to D.P., is that Dr. Pines has “engaged in conduct which constitutes abuse or exploitation of a patient arising out of the trust and

confidence placed in a physician by the patient, in violation of Idaho Code § 54-1814(22) and IDAPA 22.01.01.101.4.d.” *See* Agency R., Complaint, p. 3.

Idaho Code § 54-1814(22) does not apply to former patients. Idaho Code § 54-1814(22) (“Engaging in any conduct which constitutes an abuse or exploitation of a patient arising out of the trust and confidence placed in the physician by the patient”). This Court holds that a current doctor patient relationship is “requisite”:

Here, we can readily say that all of the doctor's offending conduct, as described in the Board's own findings, constituted "an abuse or exploitation of the patient arising out of the trust and confidence placed in the physician by the patient." Idaho Code § 54-1814(22). The evidence was undisputed that **the requisite doctor-patient relationship existed at the time of these events and that the patient was being treated for physical and mental problems at the time the offending conduct occurred.**

*Woodfield v. Bd. of Prof. Disc. of the Idaho State Bd. of Med.*, 127 Idaho 738, 755, 905 P.2d 1047, 1065 (1995) (emphasis added). A current doctor patient relationship must exist at the time the offending events occur, and it must arise from the trust and confidence placed in a physician by a patient.<sup>8</sup>

The Regulation applies to current patients, former patients who have been treated in the prior year, and, potentially, former patients with whom the “physician uses or exploits the trust,

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<sup>8</sup> The necessity of a current doctor-patient relationship under the statute is implicitly acknowledged by the Board of Medicine’s own regulation. Section 101 states that they are “additional grounds for suspension, revocation or disciplinary sanction.” IDAPA 22.01.01.101. that section then prohibits “Commission of any act of sexual contact, misconduct, exploitation or intercourse with a patient **or former patient**...” IDAPA 22.01.01.101.04.d (emphasis added). If former patients were included in Idaho Code § 54-1814(22), then there would be zero purpose in adding the words “or former patients” to the regulation.

knowledge, emotions or influence derived from the prior professional relationship with the patient.” IDAPA 22.01.01.101.4.d.iv.

Idaho law holds that the Board must reconcile the contradictory evidence to fulfill its duties under Idaho Code § 67-5279. *See Cooper v. Bd. of Prof. Disc. of the Idaho State Bd. of Med.*, 134 Idaho 449, 457, 4 P.3d 561, 569 (2000). It also holds that “findings based on witness credibility depend critically on observation of the witness. Therefore, the decision to give or deny credit to a particular witness' testimony should not be reversed absent an adequate explanation of the grounds for the reviewing body's source of disagreement with the [hearing officer].” *Woodfield v. Bd. of Prof. Disc. of Idaho State Bd. of Med.*, 127 Idaho 738, 905 P.2d 1047 (Ct.App. 1995).

While there is a dispute over whether a doctor patient relationship existed while D.P. was in the Northwest Children’s Home, there was no such relationship after that time. D.P. claimed that Dr. Pines provided him with sample medications after his eighteenth birthday.<sup>9</sup> Though, D.P. also testified that he was in the midst of a methamphetamine induced haze and has very little memory of this period of his life: “I honestly at that point was so into methamphetamine addiction, I hardly remember any other things that happened around that time.” *See Tr.*, Vol. I, p. 141.

Dr. Pines categorically denied ever giving D.P. any medicines other than those prescribed at the Northwest Children’s Home. *Id.* pp. 486-487. The Board’s own expert testified that

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<sup>9</sup> This testimony was not corroborated by any other witness, was not relied upon by the Board of Medicine to file a charge similar to Count IV, was not relied upon by the Ada County Prosecuting Attorney to prove a crime, and was impeached by D.P. himself.

“using their skills as a physician or a nurse practitioner to make or rule out diagnoses” creates a doctor patient relationship. *See* Tr., Vol. III, p. 430. The Hearing Officer concluded that “The record indicates that Dr. Pines had ceased being D.P.’s treating psychiatrist for a period of at least two years and for as much as three to four years before any sexual contacts.” *See* Agency R., Recommended Findings, p. 16.

Notwithstanding D.P.’s admission of having little memory of any events at that time, the Recommended Findings, Dr. Pines’, or their own expert’s testimony, the Board accepted D.P.’s testimony whole cloth. Under *Woodfield*, the Board is required to provide an explanation as to why it chose to override the Hearing Officer’s conclusions on credibility. Under *Cooper*, it has to reconcile contradictory evidence. No explanation or reconciliation of the evidence was offered by the Board, and no foundation for concluding that the provision of sample medications creates a doctor patient relationship was offered. This fails to meet their burden under Idaho Code § 67-5279(3), *Cooper*, *Woodfield*, and lacks substantial evidence to support the conclusion.

Because D.P. and Dr. Pines were not in a doctor patient relationship at any time following D.P.’s time at the Northwest Children’s Home, and the Board has failed to address the contradictory evidence on this issue, neither Idaho Code § 54-1814(22) nor IDAPA 22.01.01.101.4.d. apply.

**iii. The Board failed to present substantial evidence that the trust gained between D.P. and Dr. Pines arose from the doctor patient context.**

Even if the Board could prove a current doctor patient relationship at the time of the alleged abuse or exploitation, the analysis under both Idaho Code § 54-1814(22) and IDAPA 22.01.01.101.4.d requires a second factual determination, which the Board has failed to prove.

As explained above, Idaho law does not bar sexual relations between a patient and a doctor if the trust gained between the two was not garnered through the doctor patient relationship. *Levin v. Idaho State Bd. of Med.*, 133 Idaho at 418, 987 P.2d at 1033. The regulation also requires the Board to prove that the “physician uses or exploits the trust, knowledge, **emotions or influence derived from the prior professional relationship** with the patient.” IDAPA 22.01.01.101.4.d.iv (emphasis added).

D.P. testified that the basis of his relationship with Dr. Pines was as a foster child for respite care. *See* Tr., Vol. I, p. 108. He also testified that while in foster care, Dr. Pines did not provide any medical care or treatment. *Id.* pp. 111-112. He then stated that the reason he contacted Dr. Pines as an adult was solely to get money. *Id.* pp. 122, 126, 134.

The Hearing Officer concluded that Dr. Pines’ testimony did not support a finding that the application of the regulation could be extended: “In this case, Dr. Pines testified to his very limited and multidisciplinary contact with D.P. He further testified that the relationship was very informal and all encounters were minimal. Dr. Pines provided no psychotherapy or other counseling services to D.P. Accordingly, the Hearing Officer finds and concludes that the

factors allowing extension of the prohibition beyond one year are not applicable in this case.”

*See* Agency R., Recommended Findings, p. 17; *See also* Tr., Vol. III, p. 496.

There is simply no evidence that the interactions the two had at Northwest Children’s Home were the source of any trust or confidence which may have existed between the two as adults. This is particularly clear given D.P.’s repeated testimony that the basis for his adult contact with Dr. Pines was solely to get money from him, and that he was headlong into meth addiction at the time. *See* Tr., Vol. I, pp. 122, 126, 134, 141. D.P. did not know whether Dr. Pines was a psychiatrist, did not know the diagnosis given him by Dr. Pines, admittedly was “playing him” for money, and did not provide any evidence that his trust of the man arose through the prior interaction at the Northwest Children’s Home. *See* Tr., Vol. I, p. 136. There is zero evidentiary basis to conclude that the “trust, knowledge, emotions or influence derived from the prior professional relationship with the patient” was used to exploit D.P. *See* IDAPA 22.01.01.101.4.d.

The Board has neither presented substantial evidence that D.P. was a patient at the time of the events, nor shown that the trust which may have existed arose from a doctor/patient relationship. As such, there is no basis to support a finding that Dr. Pines violated Idaho Code § 54-1814(22) or IDAPA 22.01.01.101.4.d.

The Board’s conclusion relative to Count II fails as it is in violation of Idaho’s statutory provisions, was made in excess of the statutory authority of the agency, is not supported by substantial evidence, and is arbitrary, capricious, and an abuse of discretion. The conclusion also



violates Idaho Code § 67-5248 because they do not provide a “concise and explicit statement of the underlying facts of record supporting the findings.” Idaho Code § 67-5248.

**iv. There is no evidence that Dr. Pines committed a crime in regards to D.P.**

The third allegation related to D.P. (Count II) states that Dr. Pines “has committed an act constituting a felony or committed an act constituting a crime involving moral turpitude in violation of Idaho Code § 54-1814(21) and Idaho Code § 18-919.” *See* Agency R., Complaint, p. 4. The District Court agreed with the Final Order’s conclusion that a crime of moral turpitude occurred.

Idaho Code § 54-1814(21) requires a felony or “any act constituting a crime involving moral turpitude....” Idaho Code § 54-1814(21). Idaho Code § 18-919 states that it is a crime to “engage in an act of sexual contact with a patient or client.” Idaho Code § 18-919.

As with N.R., specific to Idaho Code § 54-1814(21), the Board concluded that “Dr. Pines conduct with these boys had an inherent quality of baseness or depravity with respect to a physician’s duty to his patients and his conduct was contrary to the standards expounded in the Medical Practices Act.” *See* Agency R., Final Order, p. 6. Though the heading for that section states that “Dr. Pines acts constituted crimes involving moral turpitude,” it does not identify the “crime.” *Id.* pp. 5-6. Rather, it states that the “boys were patients in contemplation of these statutes.” *See* Agency R., Final Order, p. 6.

As outlined above, a violation of §54-1814(21) facially requires the “examination and/or treatment of a medical or psychological condition.” *Id.* Idaho Code § 18-919 requires that the person with whom the sexual conduct occurs must be a “patient or client.” Idaho Code § 18-

919(a). Further, a “medical care provider” is only a person who “gains the trust and confidence of a patient or client for the examination and/or treatment of a medical or psychological condition...” Idaho Code § 18-919(b)(2). Idaho Code states that the practice of medicine is to “investigate, diagnose, treat, correct or prescribe for any human disease, ailment, injury, infirmity, deformity or other condition, physical or mental, by any means of instrumentality.” Idaho Code 54-1803(1).

The Ada County Prosecuting Attorney’s office determined that no crime was committed by Dr. Pines against D.P. and declined prosecution because there was no doctor-patient relationship and the men were adults. *See Tr.*, Vol. II, pp. 206, 297, 298. *See also* Board’s Exhibit 4. The Prosecuting Attorney was correct.

Further, contrary to the Board’s assertion, simply practicing the craft does not qualify given there was no intention to provide examination or treatment of a medical or psychological condition under either Idaho Code § 18-919 or § 54-1803. The Board’s own expert testified consistent with the Code: there must be some attempt to “make or rule out a diagnoses” to create a doctor/patient relationship. *See Tr.*, Vol. III, p. 430.

No such evidence was presented in regards to D.P. Rather, the ability to touch D.P. was gained in this case by D.P.’s attempting to get money from Dr. Pines. It certainly was not done through any form of medical relationship. This is particularly clear given D.P. freely admitted that “I was playing him.” *See Tr.*, Vol. I, p. 136. The statutes do not apply to a situation where a non-patient initiates contact for the sole purpose of gaining money by “playing” the physician, and no treatment of a medical condition occurs.

Coupled with D.P. admitting that he was “playing” Dr. Pines, he also admitted that he had no idea what his diagnoses were from his time at the Northwest Children’s Home. *See Tr.*, Vol. I, p. 145. One cannot conclude that the relationship of trust and confidence arose through the examination or treatment of a medical care provider when the alleged patient testifies under oath that he has no idea what his medical or psychological condition may have been, or what role Dr. Pines played. D.P. did not gain any trust he may have had for Dr. Pines because of his time at Northwest Children’s Home. And, given his desire to “play” the doctor and gain money for his meth addiction, one cannot imply a doctor patient relationship thereafter.

There is no substantial evidence to support a finding that Dr. Pines engaged in sexual contact with a “patient,” or that the “trust and confidence of a patient or client for the examination and/or treatment of a medical or psychological condition” was the foundation under which the alleged abuse or exploitation occurred. Because of such, there is no underlying “felony or crime of moral turpitude” that could support a violation of Idaho Code § 54-1814(21).

The Board’s conclusions as to Count II are in excess of their statutory authority, violate the statutory provision, and are hence arbitrary, capricious, and an abuse of discretion. The conclusions also violate Idaho Code § 67-5248 because they do not provide a “concise and explicit statement of the underlying facts of record supporting the findings.” Idaho Code § 67-5248.

**h. Count III: S.G.**

**i. Dr. Pines did not commit a crime in reference to S.G.**

The first claim in Count III is that Dr. Pines “has committed an act constituting a felony or committed an act constituting a crime involving moral turpitude in violation of Idaho Code § 54-1814(21) and Idaho Code § 18-919.” *See* Agency R., Complaint, p. 4.

As stated above, the Board concluded that all of the complaining witnesses were “patients.” *See* Final Order, p. 5. It did not identify any evidence specific to S.G. to support a finding related to him. This is likely because the evidence does not exist.

S.G. testified that “he was never my doctor.” *See* Tr., Vol. I, p. 92. He also stated that the contact “was not a medical exam whatsoever.” *Id.* at 92. While the Board relies upon the “affirmative act” to support its conclusion, according to their own expert witness, the doctor patient relationship arises through treatment and diagnosis, not practice. *See* Tr., Vol. III, p. 430 (Dr. McPherson’s testimony); *See also* Idaho Code § 18-919(b)(2).

Specific to S.G, the Hearing Officer “finds and concludes that the acts and conduct of Dr. Pines do not rise to the level of criminal conduct prohibited by those two code sections.” *See* Agency R., Recommended Findings, p. 19. His rationale was the same as those stated in regards to N.R. *Id.*

The Ada County Prosecuting Attorney’s office determined that no crime was committed by Dr. Pines in relation to S.G. and declined prosecution because there was no doctor-patient relationship, and S.G. was an adult. *See* Tr., Vol. II, pp. 206, 297, 298. *See also* Board’s Exhibit 4.

The witness, the prosecutor, the Hearing Officer, Idaho Code, and the evidence in the record do not indicate that a doctor patient relationship existed between S.G. and Dr. Pines. Because the Board concluded otherwise, the Final Order is not supported by substantial evidence is in excess of their statutory authority, violates the statutory provision, and is hence arbitrary, capricious, and an abuse of discretion. The conclusion also violates Idaho Code § 67-5248 because they do not provide a “concise and explicit statement of the underlying facts of record supporting the findings.” Idaho Code § 67-5248.

**ii. Because S.G. was never a patient, Dr. Pines did not violate Idaho Code § 54-1814(22) or IDAPA 22.01.01.101.04.d.**

The second allegation in Count III is that Dr. Pines “abused or exploited his position as a physician to engage in improper sexual contact in violation of Idaho Code § 54-1814(22) and IDAPA 22.01.01.101.04.d.” *See* Agency R., Complaint, p. 4.

Without a doctor patient relationship, sexual contact, or actions related to the practice of medicine, there is no violation of the law or regulation. Idaho Code § 54-1814(22); IDAPA 22.01.01.101.04.d.

The Board has presented no evidence that S.G. was ever a patient of Dr. Pines, or that sexual contact occurred. Rather, S.G. testified that “he was never my doctor,” and that it “was not a medical exam whatsoever.” *See* Tr., Vol. I, p. 92. He also stated that no sexual contact occurred: “Q: Well, you never had any sexual contact with Dr. Pines. A: Right.” *Id.* at 92. He testified that he had received a massage from Dr. Pines, but the Doctor touched only portions of

his body “other than my – you know, my genitals and my butt...[and] never actually put his hands on anything.” *Id.* at 86.

There is no substantial evidence in the record to prove that Dr. Pines violated either Idaho Code § 54-1814 or IDAPA 22.01.01.101.04.d. The Board cannot by law find a violation of the Code or the Regulation because S.G. freely admitted that he was never a patient, the contact was not medical, and what contact did occur was not sexual.

Because the Board concluded otherwise, the Final Order as to Count III is not supported by substantial evidence, is in excess of their statutory authority, violates the statutory provision, and is hence arbitrary, capricious, and an abuse of discretion. The conclusion also violates Idaho Code § 67-5248 because they do not provide a “concise and explicit statement of the underlying facts of record supporting the findings.” Idaho Code § 67-5248.

**i. Count V: B.H.**

**i. The Board’s own evidence proves that Count Five did not occur.**

The factual basis of Count V is that Dr. Pines “engaged in improper sexual contact with B.H., born [REDACTED] when B.H. was 14-years-old at Respondent’s cabin in Garden Valley.” *See* Agency R., Complaint, p. 6, ¶22. The following allegations state that they violate the Idaho Medical Practice Act “as alleged in Paragraph 22.” *Id.* p. 7.

B.H. affirmed under oath that “there was an error in the date.” *See* Tr., Vol. I, p. 172. He stated that he was off by four years. *Id.* p. 182. Notwithstanding this uncontroverted testimony, the Board concluded that “Dr. Pines engaged in sexual exploitation with the four (4) boys.” *See* Agency R., Final Order, p. 2.

Because the Count relies on facts that were proven inaccurate by the Board's own witness, there is no basis to find a violation of any law or regulation in regards to B.H. As there was zero testimony that Dr. Pines engaged in sexual contact with the minor as pled in ¶ 22 and B.H. admitted that nothing went on when he was a minor in Garden Valley, the Count fails outright.

The Board's conclusion otherwise is not supported by substantial evidence, is in excess of their statutory authority, violates the statutory provision, and is hence arbitrary, capricious, and an abuse of discretion. The conclusion also violates Idaho Code § 67-5248 because they do not provide a "concise and explicit statement of the underlying facts of record supporting the findings." Idaho Code § 67-5248.

**ii. Even if Count V alleged the contact that did occur, the claim still fails because no crime was committed.**

The first allegation of Count V, specific to B.H, states that Dr. Pines "has committed an act constituting a felony or committed an act constituting a crime involving moral turpitude in violation of Idaho Code § 54-1814(21) and Idaho Code § 18-919." *See* Agency R., Complaint, p. 7.

Without a doctor patient relationship, there is no crime under Idaho law. Idaho Code § 54-1814(21); § 18-919. The Final Order simply concludes that all the complaining parties were "patients" given there was an "affirmative act." *See* Final Order, p. 3.

B.H. was never a foster child, and knew Dr. Pines through the latter's son. *See* Tr., Vol. I, p. 164. B.H. testified unequivocally that he never had a doctor patient relationship with Dr.

Pines, and stated that any relationship that did exist arose socially. *Id.* pp. 168-169, 182 (“Q: You never had a doctor patient relationship with Dr. Pines, did you? A: I did not”). The Hearing Officer concluded that “the acts and conduct of Dr. Pines do not rise to the level of criminal conduct prohibited by those two code sections.” *See Agency R., Recommended Findings*, p. 22.

The Board identifies no specific evidence to justify rejecting the Hearing Officer’s conclusions or the testimony of the witness. The Board has likewise presented no evidence that a felony was committed, and has not proven that the requisite doctor patient relationship existed to prove a misdemeanor. Rather than identifying evidence which supports its conclusions, it simply states that all of the complaining witnesses were patients.

As such, no evidence of a crime exists relevant to B.H. under Idaho Code § 54-1814(21) or Idaho Code § 18-919. The Board’s conclusion otherwise is not supported by substantial evidence, is in excess of their statutory authority, violates the statutory provision, and is hence arbitrary, capricious, and an abuse of discretion. The conclusion also violates Idaho Code § 67-5248 because they do not provide a “concise and explicit statement of the underlying facts of record supporting the findings.” Idaho Code § 67-5248.

**iii. Dr. Pines did not violate the Code or the regulation because there was no doctor patient relationship with B.H.**

The second claim in Count V alleges that Dr. Pines “has abused or exploited his position as a physician to engage in improper sexual contact in violation of Idaho Code § 54-1814(22) and IDAPA 22.01.01.101.04.d.” *See Agency R., Complaint*, p. 7. Both the regulation and the



Code require a doctor patient relationship, or a relation to the practice of medicine. Idaho Code § 54-1814(22); IDAPA 22.01.01.101.04.d.

B.H. testified that no doctor/patient relationship ever existed with Dr. Pines. *See* Tr., Vol. I, p. 182. No evidence countered this fact. B.H. also testified that the relationship he shared with Dr. Pines arose through being a friend of one of the Doctor's children. *Id.* p. 168. The evidence is uncontested.

As to any actions "related to the licensee's practice of medicine" under the regulation, B.H. testified that Dr. Pines requested help with a "massage therapy license." *Id.* p. 174. B.H. specifically denied that it had to do with his osteopathic license. *Id.* ("Q. Was it the doctor of osteopath? A. No...it was massage therapist renewal, massage therapist license.").

Because the practice of medicine and massage therapy are distinct legal activities, anything related to massage therapy cannot be considered "related to the practice of medicine." The practice of medicine and massage therapy are each controlled by a separate Board under Idaho's statutes, are not interconnected, and have no cross over application in the law. *See* Idaho Code § 54-400 *et seq*; § 54-1800 *et seq*. Any representation made by Dr. Pines about massage therapy had exactly nothing to do with the practice of medicine.

There is no evidence to support a finding that Dr. Pines violated Idaho Code § 54-1814(22) or IDAPA 22.01.01.101.04.d in reference to B.H. The Board's conclusion otherwise is not supported by substantial evidence, is in excess of their statutory authority, violates the statutory provision, and is hence arbitrary, capricious, and an abuse of discretion. The conclusion also violates Idaho Code § 67-5248 because they do not provide a "concise and

explicit statement of the underlying facts of record supporting the findings.” Idaho Code § 67-5248.

**j. The rejection of the Hearing Officer’s Recommended Findings of Fact and Conclusions of Law lacks the appropriate foundation.**

The Order states that “the Board rejected the Hearing Officer’s Recommended Findings of Fact and Conclusions of law.” *See* Agency R., Findings of Fact, Conclusions of Law and Final Order, p. 2 (“Final Order”).

This Court holds that there is heightened scrutiny when the Board rejects the Hearing Officer’s conclusions.

When the Board's findings disagree with those of the officer issuing the recommended order, the question for the reviewing court remains whether the Board's findings are supported by substantial evidence. Although the district court is not required to take into account the hearing officer's findings, this Court “will scrutinize the Board's findings of fact more critically if they contradict the [hearing officer's] conclusions than if they accord with the [hearing officer's] findings.” ...

It is consistent with the Board's statutory obligation to render a reasoned decision to require the Board to identify facts, as well as inferences drawn from the facts upon the application of its expertise and judgment, which underlie its decision. Such an explanation is essential to meaningful judicial review, and it is a logical adjunct to the agency's statutory duty to supplement its decisions with findings of fact and conclusions of law.

*Woodfield v. Bd. of Prof. Disc. of Idaho State Bd. of Med.*, 127 Idaho 738, 746-747, 905 P.2d 1047, 1055-1056 (Ct.App. 1995).

The Final Order fails to provide a reasoned basis to reject all of the Hearing Officer’s conclusions. Rather, the Final Order states that the Hearing Officer’s “failure emanated from a

lack of understanding and experience using multiple forms of legal-medical data to inform his Recommended Finding and his preservice as a Hearing Officer did not prepare him or serve as a guide through the changes in attitude and behavioral accountability the Board demands of the physicians it licenses.” *See* Agency R., Final Order, p. 2.

While the Board then makes statements supporting its departure from the Hearing Officer, as explained above, much of what it claims is not supported by any actual evidence. The Board concludes:

The evidence clearly establishes that Dr. Pines held himself out as a physician while engaging in sexual exploitation of these four (4) minors under the ruse they were practice patients. The Board, therefore, specifically rejects the Hearing Officer’s findings that the boys were not “patients” of Dr. Pines...[and]...rejects the Recommended Findings in this matter.

*See* Agency R., Final Order, p. 3.

The very foundation of the Board’s rationale lacks any evidentiary support. No witness testified that any of the contact alleged in the complaint occurred when the witnesses were minors, nor that any of them were patients. Under *Cooper* and *Woodfield*, because the Board has utterly failed to address this contradiction in the actual evidence, the Final Order should be set aside and this action dismissed.

**k. A substantial right is affected by the Final Order.**

Idaho Code § 67-5279 states that an “agency action shall be affirmed unless substantial rights of the appellant have been prejudiced.” Idaho Code § 67-5279(4).

The right to practice a chosen profession is a valuable property right which cannot be deprived unless one is provided with the safeguards of due process. *Schwartz v. Bd. of Bar Examiners*, 353 U.S. 232, 77 S.Ct. 752, 1 L.Ed.2d 796 (1957) (lawyer); *Tuma v. Bd. of Nursing*, 100 Idaho 74, 593 P.2d 711 (1979) (nurse); *Ferguson v. Bd. of Trustees of Bonner County School Dist. No. 82*, 98 Idaho 359, 564 P.2d 971 (1977) (teacher).

The Final Order revokes Dr. Pines' license to practice medicine. *See* Agency R., Final Order, p. 7. Substantial rights have been prejudiced.

## **VI. Conclusion:**

The Board's practical position in this case is that a physician may be disciplined for actions that are neither criminal nor with a patient. Expanding the definition of "patient" to this situation renders the meaning of the statutes indecipherable. The Medical Practices Act is limited to actions taken to "investigate, diagnose, treat, correct or prescribe for any human disease, ailment, injury, infirmity, deformity or other condition, physical or mental, by any means or instrumentality." Idaho Code § 54-1803(1). Given neither the complaining parties nor the physician thought there was a doctor patient relationship, one is left to guess when the regulations or statutes apply. This interpretation is beyond the Board's statutory authority, violates Dr. Pines' constitutional rights, and must be set aside.

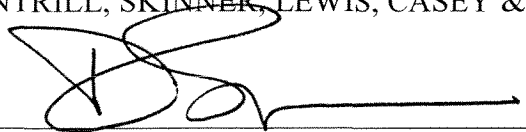
Dr. Pines' actions were neither criminal nor in violation of regulation. The young men were not his patients, any trust that existed between them did not arise from being a patient, and there was no attempt to investigate, diagnose or treat anything. Given there was no attempt to diagnose or treat, Dr. Pines' behavior is not subject to discipline. The Board's conclusions are

not supported by substantial evidence, exceed their statutory authority, violate the statutory provision, and are hence arbitrary, capricious, and an abuse of discretion. The matter should be remanded with an order to dismiss.

DATED This 15<sup>th</sup> day of August, 2014.

CANTRILL, SKINNER, LEWIS, CASEY & SORENSEN, LLP

By:

A handwritten signature in black ink, appearing to be "D. Skinner", written over a horizontal line.

Daniel J. Skinner, Of the Firm  
Attorneys for Respondent


CERTIFICATE OF SERVICE

I hereby certify that on this 15<sup>th</sup> day of August, 2014, I served two true and correct copies of the above and foregoing instrument, by method indicated below, upon:

Jean R. Uranga  
URANGA & URANGA  
714 North 5<sup>th</sup> Street  
P.O. Box 1678  
Boise, ID 83701

*Attorney for Idaho Board of Medicine*

[ ] Facsimile  
[ ] Hand Delivery  
[X] U.S. Mail

  
\_\_\_\_\_  
Daniel J. Skinner